UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BRINKER INTERNATIONAL PAYROLL COMPANY LP, a limited partnership, Respondent, and THE SAWAYA & MILLER LAW FIRM, Charging Party.	Case 27-CA-110765

BRIEF IN SUPPORT OF RESPONDENT BRINKER INTERNATIONAL PAYROLL COMPANY LP'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

For the reasons set forth in this Brief and the accompanying Exceptions, the Decision of Administrative Law Judge Lauren Esposito ("ALJ") is seriously flawed and cannot stand.

II. THE ALJ ERRED IN REFUSING TO FOLLOW SUPREME COURT PRECEDENTS INTERPRETING THE FEDERAL ARBITRATION ACT ("FAA")[1] AND MANDATING THAT ARBITRATION AGREEMENTS BE ENFORCED ACCORDING TO THEIR TERMS

A. The Validity of Respondent's Agreement to Arbitrate and the Class Action Waiver Contained in the Agreement Must Be Determined Under the FAA and Not Under *D.R. Horton* or the NLRA

Respondent's Second Affirmative Defense in its Answer to Complaint and Affirmative Defenses ("Answer") filed on February 13, 2014, alleges, in part:

[1] 9 U.S.C. § 1, *et seq*

> The Complaint is barred because it is based on the Board's decision in *D.R. Horton, Inc. and Michael Cuda,* [357] NLRB No. 184 (2012), which is contrary to recent decisions of the United States Supreme Court holding that arbitration agreements must be enforced according to their terms, including *AT&T Mobility LLC v. Concepcion,* 131 S.Ct. 1740 (2012); *CompuCredit Corp. v. Greenwood,* 132 S.Ct. 665 (2012), and *Marmet Health Care Ctr. v. Brown,* 132 S.Ct. 1201 (2012).[2]

(Jt. Ex. 3 at p. 4) The Supreme Court's most recent decision interpreting the FAA and upholding class action waivers, *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013), can also be added to the authorities listed in Respondent's Second Affirmative Defense. In *American Express*, which was issued after the Board's decision in *D.R. Horton,* the Supreme Court held that a class action waiver must be enforced according to its terms in the absence of a "contrary congressional command" in the federal statute at issue. *Id.* at 2309; *see also CompuCredit,* 132 S.Ct. at 669 (also issued after the Board's decision in *D.R. Horton).* The Supreme Court also held in *American Express* that a class action waiver is not invalidated by the so-called "effective vindication" doctrine, which originated as dictum in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 105 S.Ct. 3346 (1985). *American Express,* 133 S.Ct. at 2310.

Under the Supreme Court's decisions in *Concepcion, CompuCredit, Marmet* and *American Express,* it is evident that the validity of Respondent's Agreement to Arbitrate and the class action waiver contained therein must be determined under the FAA, and not under *D.R. Horton* or the NLRA. To demonstrate the enforceability of Respondent's arbitration agreement under the FAA, and the inapplicability of the Board's reasoning in

[2] *See* also Respondent's Third and Fourth Affirmative Defenses, which allege that the Board cannot act in derogation of the FAA and does not have authority to invalidate individual arbitration agreements. (Jt. Ex. 3 at p. 4)

D.R. Horton as it applies to arbitration agreements containing class action waivers, Respondent submits the following summary of critical principles gleaned from Supreme Court precedents construing the broad reach and preemptive effective of the FAA.

- The FAA reflects an "emphatic policy in favor" of arbitration. Enacted in 1925, the FAA places arbitration agreements on the same footing as other contracts and declares that such agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law for the revocation of any contract." 9 U.S.C. § 2. The FAA "reflects an emphatic federal policy in favor" of arbitration. *KPMG, LLP v. Cocchi*, 132 S.Ct. 23, 25 (2011). As the Supreme Court has emphasized, arbitration agreements are to be read liberally to effectuate their purpose, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 103 S.Ct. 927, 941 (1983), and are to be "rigorously enforced," *Perry v. Thomas*, 107 S.Ct. 2520, 2526 (1987).
- Arbitration agreements, including those containing class action waivers, are enforceable in accordance with their terms. "The FAA reflects the fundamental principle that arbitration is a matter of contract." *Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772, 2776 (2010). As such, courts are primarily charged with the responsibility to enforce arbitration agreements in accordance with their terms so as to give effect to the bargain of the parties. *See, e.g.*, *CompuCredit*, 132 S.Ct. at 669 (The FAA "requires courts to enforce agreements to arbitrate according to their terms"); *Marmet,* 132 S.Ct. at 1203 (citation omitted) (The FAA "'requires courts to enforce the bargain of the parties to arbitrate'"). Because arbitration is a matter of contract, the parties to an arbitration agreement can agree to waive class arbitration. *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758, 1774

(2010) (The parties to an arbitration "may agree to limit the issues they choose to arbitrate," "may agree on [the] rules under which any arbitration will proceed," and "may specify *with whom* they choose to arbitrate their disputes"). Indeed, as the Supreme Court recently observed when holding that a state law requiring parties to submit to class arbitration was preempted by the FAA: a state law requiring parties, in contravention of their arbitration agreement, to "shift from bilateral arbitration to class-action arbitration" results in a "fundamental" change to their bargain and is "inconsistent with the FAA." *Concepcion*, 131 S.Ct. at 1748-1751.

- Arbitration agreements involving federal statutory rights, including those containing class action waivers, are enforceable "unless Congress itself has evinced an intention," when enacting the statute, to "override" the FAA mandate by a clear "contrary congressional command." *Mitsubishi,* 105 S.Ct. at 3354-3355; *American Express,* 133 S.Ct. at 2309. The Supreme Court has consistently held that parties may agree to arbitrate claims arising under federal statutes. *See, e.g., Mitsubishi, supra,* 105 S.Ct. 3346. As long as the arbitral forum affords the parties the opportunity to vindicate any statutory rights forming the basis of their claims, the parties will be held to their bargain to arbitrate. *CompuCredit*, 132 S.Ct. at 671 ("So long as the *guarantee* [of a federal statute's civil liability provision]—*the guarantee of the legal power to impose liability*—is preserved," the parties remain free to enter into an agreement requiring the arbitration of their statutory rights). However, if, when enacting a federal statute, "Congress itself has evinced an intention to preclude a waiver of judicial remedies

for the statutory rights at issue," then such statutory rights cannot be subjected to arbitration and the FAA's mandate to enforce arbitration agreements according to their terms is thereby overridden by a contrary congressional command. *Mitsubishi*, 105 S.Ct. at 3354-3355; *American Express,* 133 S.Ct. at 2309. "If Congress did intend to limit or prohibit [the] waiver of a judicial forum for a particular claim, such an intent 'will be deducible from [the statute's] text or legislative history'" or "from an inherent conflict between arbitration and the statute's underlying purpose." *Shearson/American Express, Inc. v. McMahon*, 107 S.Ct. 2332, 2337 (1987), quoting *Mitsubishi,* 105 S.Ct. at 3356-3359. However, any expression of congressional intent in this regard must be clear and unequivocal. *See, e.g., CompuCredit*, 132 S.Ct. at 597 (If a statute "is silent on whether claims under [it] can proceed in an arbitr[al] forum, the FAA requires the arbitration agreement to be enforced according to its terms").

- Employment arbitration agreements fall within the ambit of the FAA and are enforceable on the same terms as other arbitration agreements. The FAA encompasses employment arbitration agreements, including those containing class action waivers. *Circuit City Stores, Inc. v. Adams*, 121 S.Ct. 1302, 1311 (2001). As the Supreme Court affirmed in *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647, 1655 (1991), where it enforced an arbitration agreement involving a claim arising under the Age Discrimination in Employment Act, the FAA requires such a result even if there may be "unequal bargaining power between employers and employees" and even if "the arbitration could not go forward as a class action." As to this latter point, the Supreme Court in *Gilmer* recognized that a

class action, as set forth in the Federal Rules of Civil Procedure, is simply a procedural device which, as the Rules Enabling Act, 28 U.S.C. § 2072(b), makes clear, cannot "abridge, enlarge or modify any substantive right"—and can be, like the choice of a judicial forum, waived.

As these principles attest, the FAA recognizes the rights of parties, whether they are employers or employees, to enter into arbitration agreements, including the right to fashion the procedures under which an arbitration is to proceed. The FAA further mandates that arbitration agreements be enforced according to their terms unless there is a clear congressional command to the contrary. Indeed, there is nothing in the NLRA itself or its legislative history that would even suggest that Congress sought to "override" the FAA's mandate and preclude an employee from waiving his or her procedural right to file a class action when agreeing to arbitrate employment-related claims.

Just as a union acting on behalf of its members can voluntarily agree to waive a judicial forum and require its members to arbitrate their individual employment claims, there is no reason why Respondent's employees cannot voluntarily do so as well on their own behalf. *14 Penn Plaza, LLC v. Pyett*, 129 S.Ct. 1456, 1465 (2009) ("Nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative").

B. Following Supreme Court Precedent, the Fifth Circuit Has Set Aside the Board's *D.R. Horton* Decision and Order

On December 3, 2013, the Fifth Circuit Court of Appeals granted the petition for review filed by Petitioner/Cross-Respondent D.R. Horton, Incorporated, in the *D.R. Horton* case and ultimately set aside the Board's decision invalidating the company's arbitration agreement. *D.R. Horton, Inc. v. NLRB,* 737 F.3d 344 (5th Cir. 2013). The court held that "the Board's decision

did not give proper weight to the [FAA]." *Id.* at 348. In a detailed opinion, the court examined the Board's *D.R. Horton* decision in light of applicable Supreme Court precedent and rejected all of the Board's arguments. First, the court held that the Board could not rely on the FAA's "saving clause" to justify its invalidation of arbitration agreements, as the court explicitly stated that "[a] detailed analysis of *Concepcion* leads to the conclusion that the Board's rule does not fit within the FAA's saving clause." *Id.* at 359. The court also determined that the Board's prohibition of class action waivers disfavors arbitration, as it ruled that "[w]hile the Board's interpretation is facially neutral—requiring only that employees have access to collective procedures in an arbitral or judicial forum—the effect of this interpretation is to disfavor arbitration." *Id.* at 361.

Next, the court concluded the NLRA does not contain a congressional command overriding the FAA. Relying on *Gilmer*, the court stated: "When considering whether a contrary congressional command is present, courts must remember 'that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.'" *Id.* at 361 (citations omitted). The court explicitly ruled that "there is no basis on which to find that the text of the NLRA supports a congressional command to override the FAA." *Id.* at 360. Moreover, the court found that neither the legislative history of the NLRA, nor any policy consideration, would permit the NLRA to override the FAA. *Id.* at 361. The court also noted that it was of some importance that "the NLRA was enacted and reenacted prior to the advent in 1966 of modern class action practice." *Id.* at 362. Thus, the court reached the conclusion that "[t]he NLRA should not be understood to contain a congressional command overriding application of the FAA," noting that "[e]very one of our sister circuits to consider the issue has either suggested

or expressly stated that they would not defer to the NLRB's rationale, and held arbitration agreements containing class action waivers enforceable." *Id.* at 362.

One such "sister circuit" is the Eighth Circuit, which also concluded that the Board's *D.R. Horton* decision was invalid. *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013). *See also Richards v. Ernst & Young, LLP,* 734 F.3d 871, 873-874, n. 3 (9th Cir. 2013); *Sutherland v. Ernst & Young LLP,* 726 F.3d 290, 297-298, n.8 (2nd Cir. 2013); and *Ashley Walthour, et al. v. Chipio Windshield Repair, LLC, et al.*, No. 13-11309, 2014 U.S. App. LEXIS 5315, (11th Cir. March 21, 2014).

C. Given the U.S. Supreme Court Decisions Interpreting the FAA, and the Appellate Court Decisions Repudiating the Board's Decision in *D.R. Horton*, There Are No Credible Grounds for Finding Merit in the Acting General Counsel's Complaint

Given the Supreme Court's recent decisions in *Concepcion, CompuCredit, Marmet* and *American Express,* it can no longer be argued that the Board's repudiation of class action waivers is good law. This is especially so in light of *American Express,* which held that arbitration agreements with class action waivers are enforceable under the FAA notwithstanding any policy arguments to the contrary contained in other state and federal statutes. *American Express*, 133 S.Ct. at 2337. Only a "contrary congressional command" in a particular statute can override the FAA's mandate that arbitration agreements be enforced according to their terms. *Id.* As the analysis set forth above demonstrates, no such "congressional command" exists in the NLRA.

Further support for this position can be found in the November 8, 2013, decision by ALJ Bruce D. Rosenstein in *Chesapeake Energy Corporation*, which recommended dismissal of Section 8(a)(1) allegations that were based on the Board's *D.R. Horton* decision. The respondents in that case maintained a dispute resolution policy which included an arbitration

agreement with a class action waiver. ALJ Rosenstein relied on *American Express* and the other Supreme Court decisions interpreting the FAA when he issued the following ruling:

> The Supreme Court noted in the *American Express* decision that no contrary congressional command required us to reject the waiver of class arbitration here and the Sherman and Clayton Acts make no mention of class actions. In fact, they were enacted decades before the advent of *Federal Rule of Civil Procedure 23,* which was "designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." As it concerns the subject case, the principles expressed by the Supreme Court equally apply to the Board since the Act does not mention class actions, and was enacted long before the advent of *Rule 23.*
>
> For all of the above reasons, and principally relying on the decision of the Supreme Court in *American Express* discussed above, I find in agreement with the Respondents that the Board's position that class and collective action waivers in arbitration agreements violate *Section 8(a)(1)* of the Act cannot be sustained. Accordingly, I recommend that paragraph 4(a) of the complaint be dismissed.

Chesapeake Energy Corp., 2013 NLRB LEXIS 693 at *23-24.

Similarly, ALJ Keltner W. Locke, the Administrative Law Judge in *Haynes Building Services LLP, et al.*, 2014 NLRB LEXIS 94 (February 7, 2014), concluded that "Supreme Court decisions, issued after the Board's decision in *D.R. Horton,* relieve that case's rationale of its vitality." *Id.* at *19. Specifically, ALJ Locke noted:

> In *American Express Co.*, the Supreme Court forcefully applied the principle, articulated in earlier decisions, that courts must 'rigorously enforce' arbitration agreements according to their terms. It further stressed that courts remain obligated to enforce an arbitration agreement even if the dispute concerns the alleged violation of a federal statute.
>
> The Court noted one narrow exception to the principle that an arbitration agreement must be enforced. That exception arises when the FAA's arbitration mandate has been 'overridden by a contrary congressional command.' *American Express Co. v. Italian Colors Restaurant,* 133 S.Ct. at 2309. The word 'command' again suggests that Congress must express clearly and unmistakably its intent to override the FAA's mandate. Leaving no doubt, the Court cited its previous *CompuCredit Corp.* decision.
>
> As discussed above, the *CompuCredit Corp.* opinion pointed out that even a specific statutory authorization to bring suit in 'district court' did not neutralize

> the parties' agreement to submit a dispute to arbitration and courts remained obligated to enforce that arbitration agreement. Thus, even when the law itself referred to litigation in district court, that language did not rise to the level of a 'congressional command' contradicting the FAA's mandate.
>
> The National Labor Relations Act does not include any language resembling a 'congressional command' to lift the FAA's arbitration mandate. Therefore, I must conclude that the strong government policy favoring arbitration applies here.
>
> *Id.* at *35-37.
>
> . . . .
>
> The Supreme Court's recent decision in *American Express Co.*, considered in the context of its earlier opinions concerning the Federal Arbitration Act, leaves no doubt; the FAA policy would prevail. When all the recent Supreme Court decisions interlock, they create a space in which the *D. R. Horton* rationale has no oxygen.
>
> *Id.* at *42.

While the decisions of ALJ Rosenstein and ALJ Locke are not the decisions of the Board, they nevertheless provide persuasive evidence demonstrating that the FAA preempts the Board's decision in *D.R. Horton.* Moreover, as noted by the Fifth Circuit in its decision setting aside *D.R. Horton,* "no court decision prior to the Board's ruling under review today had held that the Section 7 right to engage in 'concerted activities for the purpose of . . . other mutual aid or protection' prohibited class action waivers in arbitration agreements." *D.R. Horton v. NLRB,* 737 F.3d at 356 (citation omitted).

Ultimately, the text of the FAA, the Supreme Court's decisions in *American Express* and *Concepcion,* and the five circuit courts that have all rejected the NLRB's decision in *D.R. Horton* clearly demonstrate that the ALJ erred by concluding that Respondent's Agreement to Arbitrate violates the Act.

III. THE PREEMPTIVE EFFECT OF THE FAA INVALIDATES THE REMEDIES ORDEREDED BY THE ALJ

The ALJ's Order seeks broad remedies, including ordering Respondent to cease and desist from: (a) maintaining a mandatory arbitration agreement that requires employees to waive their right to pursue class action claims in all forums; (b) maintaining a mandatory arbitration agreement that would reasonably be interpreted as prohibiting employees from filing unfair labor practice charges with the NLRB; and, (c) filing motions in court to enforce the Agreement to Arbitrate and compel arbitration of individual claims.

In addition, the proposed Order would require Respondent to: (a) revise the Agreement to Arbitrate to clarify that it does not restrict the right to file unfair labor practice charges, and it does not constitute a waiver of the right to pursue class action claims in all forums; (b) notify all employees of the revised agreement and provide them with a copy of the same; (c) file a joint motion with Charging Party to vacate the District Court's February 18, 2014, Order granting Respondent's Motion to Compel; (d) reimburse Sarah Hickey ("Hickey"), Amy Gulden ("Gulden") and Jay Ragsdale ("Ragsdale") for all litigation and related expenses incurred as a result of Respondent's Motion to Compel; and, (e) post a Notice at all of Respondent's facilities where the Agreement to Arbitrate has been in effect.

As discussed above, the Supreme Court's recent decisions demonstrate that the FAA has a very broad preemptive effect, and that all state and federal laws and public policies interfering with the enforcement of arbitration agreements according to their terms must give way. Thus, in *Marmet,* the Supreme Court vacated a decision by the Supreme Court of Appeals of West Virginia which held that West Virginia's public policy against arbitration of personal injury or wrongful death claims against nursing homes was not preempted by the FAA. The Supreme

Court stressed that West Virginia's policy was "a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA." *Marmet,* 132 S.Ct. at 1204. In *Concepcion*, the Supreme Court found that a rule which stands as an "obstacle" to the accomplishment of Congress' objectives under the FAA cannot stand. *Concepcion,* 131 S. Ct. at 1753.

Here, the remedies ordered by the ALJ clearly create obstacles to the enforcement of arbitration agreements according to their terms and, therefore, conflict with the FAA. The relief ordered by the ALJ would require Respondent to stop enforcing its Agreement to Arbitrate, and would penalize Respondent for enforcing the agreement by requiring Respondent to reimburse litigation expenses incurred by employees who opposed enforcement of the agreement.[3] Such relief is completely contrary to the Supreme Court's mandate that arbitration agreements be enforced according to their terms.

Ultimately, the remedies ordered by the ALJ in this case would undoubtedly discourage the use of arbitration, contrary to federal policy under the FAA. As such, Respondent objects to the remedies ordered by the ALJ, as they should be invalidated by the preemptive effect of the FAA.

IV. THE ALJ ERRED BY FINDING THAT RESPONDENT'S AGREEMENT TO ARBITRATE WOULD REASONABLY BE INTERPRETED AS PREVENTING EMPLOYEES FROM FILING CHARGES WITH THE BOARD

The General Counsel's Complaint does not allege that Respondent violated the Act by maintaining an arbitration agreement that would reasonably be interpreted as preventing

[3] Requiring Respondent to reimburse litigation expenses would also interfere with the authority of the U.S. District Court in the pending civil case. Whether litigation expenses should be reimbursed is a decision for the U.S. District Court to be made at an appropriate point in the case, not a decision to be made by a federal agency which is not a party to the litigation.

employees from filing charges with the Board. The ALJ, however, excused the absence of any allegation in the Complaint and concluded that "employees would reasonably interpret Respondent's Agreement to Arbitrate as prohibiting them from filing unfair labor practice charges." (ALJ Dec., 6:13-14) The ALJ's conclusion is flawed in this respect, as Respondent's Agreement to Arbitrate expressly states:

> "This agreement does not limit an employee's ability to complete any external administrative remedy (such as with the EEOC)."

(Jt. Ex. 4 at p. 2)

Thus, Respondent's Agreement to Arbitrate does not restrict an employee's right to file charges with the NLRB, as the language quoted above clearly authorizes employees to seek relief from administrative bodies such as the EEOC or the NLRB.

Moreover, the fact that Hickey, Gulden and Ragsdale filed an unfair labor practice charge in the present case provides solid evidence that the Agreement to Arbitrate does not bar or restrict employees from filing charges with the NLRB. Indeed, if the ability to file unfair labor practice charges was truly barred or restricted by the Agreement to Arbitrate, then Hickey, Gulden and Ragsdale would not have filed a charge in the present case.

Respondent also objects to the ALJ's Remedy requiring the Agreement to Arbitrate to be revised "to clarify that it . . . does not restrict employees' right to file unfair labor practice charges with the National Labor Relations Board . . ." (ALJ Dec., 10:13-16) As the analysis in the previous sections demonstrates, the FAA does not permit the Board to dictate the contents or language of an arbitration agreement. Under the FAA, arbitration agreements must be enforced according to their terms, a mandate which does not permit agencies such as the Board to regulate the contents of the agreements, unless the statute (here, the NLRA) expressly permits the agency to do so. Just as the Board cannot insist that class action waivers be removed from arbitration

agreements (see *American Express*), it cannot insist that language clarifying the right to file Board charges be added to arbitration agreements. If every federal and state agency insisted that language about employee rights to pursue charges be added to arbitration agreements, the agreements would become completely unwieldy. Arbitration agreements are to be enforced according to *their* terms, not terms set by government agencies. *See Concepcion*, 131 S.Ct. at 1748.

V. THE ALJ ERRED BY REJECTING RESPONDENT'S ARGUMENT THAT THE BOARD'S DECISION IN *D.R. HORTON* IS NULL AND VOID BECAUSE THE BOARD DID NOT HAVE A VALID QUORUM AT THE TIME IT ISSUED ITS DECISION

Respondent's Sixth Affirmative Defense in its Answer alleges, in part that:

> The Complaint is barred because the Board's decision in *D.R. Horton, Inc. and Michael Cuda,* 337 NLRB No. 184 (2012) is null and void *ab initio* because the Board did not have a valid quorum at the time it issued its decision.

(Jt. Ex. 3 at p. 5)

The Board did not have a valid quorum at the time the *D.R. Horton* case was decided, as Board Member Craig Becker's recess appointment expired on December 31, 2011, which left the Board with only two valid members at the time the *D.R. Horton* decision was issued on January 3, 2012. Under the U.S. Constitution, "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." (U.S. Const., art. II, § 2, cl. 3). Because Member Becker was recess appointed to the Board during the second Session of the 111th Congress, his term expired at the end of the first session of the 112th Congress. This occurred when the Acting President *pro tempore* of the Senate adjourned the Senate at "11 and 34 seconds a.m." on December 30, 2011 (157 Cong. Rec. S8793 (daily ed. Dec. 30, 2011)). Accordingly, Member Becker's term had expired at the time the *D.R. Horton* decision was rendered on January 3, 2012, and the decision

was not made by a valid quorum of Board members. *See New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010); *Sutherland v. Ernst & Young LLP*, 726 F.3d at 297, n. 8.

Moreover, even if Member Becker's term was not expired at the time the Board's *D.R. Horton* decision was issued, the Board still lacked a valid quorum at the time the *D.R. Horton* case was decided. To illustrate, on June 26, 2014, the United States Supreme Court affirmed the D.C. Circuit Court's ruling in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), concluding that President Obama's three recess appointments to the National Labor Relations Board in January 2012 (Sharon Block, Richard Griffin, and Terence Flynn) were invalid. See *National Labor Relations Board v. Noel Canning, et al.*, No. 12-1281 (June 26, 2014). The Court upheld the right of the President to make recess appointments both inter- and intra-session, but held that it is the Senate that decides when it is in session by retaining the power to conduct business pursuant to its own rules. The Court also found that a recess of three days or less is too short to allow for a valid recess appointment, and that a recess of four to less than ten days "is presumptively too short" to permit the President to make a recess appointment, except in "unusual circumstances," such as a "national catastrophe". (The recess here was three days.)

The rationale set forth in *Noel Canning* confirms that the March 2010 recess appointment of former NLRB member Craig Becker was invalid because Becker was appointed during a brief, three-day intersession recess. Consequently, it is irrelevant whether Becker's term had expired at the time the *D.R. Horton* decision was issued, as his appointment to the Board was invalid from the inception. As such, the Board was clearly acting without a valid quorum at the time the *D.R. Horton* decision was issued. Thus, the Board's ruling in *D.R. Horton* was void *ab initio*.

Respondent, throughout the entire course of this proceeding, has taken the position that the Board's ruling in *D.R. Horton* was void because the Board did not have a valid quorum at the time the decision was issued. The General Counsel's Complaint and the ALJ's decision in this matter are entirely predicated on the Board's *D.R. Horton* decision, which has now been rendered unenforceable. Consequently, the present Complaint against Respondent should be dismissed in its entirety.

VI. THE ALJ ERRED BY REJECTING RESPONDENT'S ARGUMENT THAT HICKEY, GULDEN, AND RAGSDALE FILED THEIR ULP CHARGES BEYOND THE SIX-MONTH STATUTE OF LIMITATIONS SET FORTH IN SECTION 10(b) OF THE ACT

A. The ALJ Erred By Failing to Conclude that Charging Party's Unfair Labor Practice Charge is Untimely

Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and service of a copy thereof upon the person against whom such charge is made . . . ." 29 U.S.C. § 160(b). In her decision, the ALJ held that "Respondent's argument that the Complaint in this matter is time-barred pursuant to Section 10(b) of the Act is also unpersuasive." (ALJ Dec., 5:27-28) In rejecting Respondent's argument, the ALJ went on to hold that where "a rule violating Section 8(a)(1) is maintained during the 10(b) period, a violation is established even if the rule was promulgated prior to that time." (ALJ Dec., 5:28-30) Contrary to the ALJ's decision, Respondent's Agreement to Arbitrate is a binding legal contract that was executed in June 2012, not a "rule" that was maintained during the 10(b) period. Consequently, the actions giving rise to the instant charge – and therefore the date from which the 10(b) period commenced - occurred more than six months before Charging Party filed the current charge.

More specifically, Hickey, Gulden and Ragsdale became bound by the current version of the Agreement to Arbitrate in June 2012. (Jt. Mot.[4] at p. 10) Thus, the six-month statute of limitations with respect to any challenges to the process by which Hickey, Gulden and Ragsdale became bound to the Agreement to Arbitrate expired in December 2012. However, Charging Party did not file the present unfair labor practice charge until August 7, 2013, approximately 14 months after Gulden, Hickey and Ragsdale entered into the most recent version of the Agreement to Arbitrate. (Jt. Ex. 1) Thus, the ALJ erred in failing to conclude that the allegations pertaining to Hickey's, Gulden's and Ragsdale's execution of the Agreement to Arbitrate in June 2012 are clearly time barred pursuant to Section 10(b) of Act.

B. The ALJ Erred by Concluding that the Agreement to Arbitrate is a "Rule" that was "Maintained" During the 10(b) Period

The ALJ erred by concluding that Respondent's Agreement to Arbitrate was a "rule" that was "maintained during the 10(b) period." (ALJ Dec., 5:28-30) The ALJ ultimately concluded that Respondent's Agreement to Arbitrate is a "rule" or a "policy" that interferes with employees' Section 7 rights pursuant to the Board's decisions in *Lafayette Park Hotel,* 326 NLRB 824 (1998) and *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004), rather than a "contract" between the employees and Respondent.

Despite the ALJ's conclusion to the contrary, the Board's decisions involving "rules" have no applicability to "contracts" such as Respondent's Agreement to Arbitrate. A rule can be unilaterally modified by an employer, but a contract may not. A contract is binding and enforceable according to its terms. And, because of this, allegations that a contract violates the Section 7 rights of employees must be brought within six months of the date the contract was entered into, not within six months of the date it is "enforced."

[4] "Jt. Mot" refers to the parties' Joint Motion to Waive Hearing and Submit Case to the Administrative Law Judge and Joint Stipulation of Facts.

Thus, *Lafayette Park Hotel* and its progeny should not be applied to Respondent's Agreement to Arbitrate, which is a contract rather than a "rule." This is particularly the case where, as here, Hickey, Gulden and Ragsdale actually signed the Agreement to Arbitrate, which included specific language stating as follows:

> By signing below, I affirm that I have read the above Agreement to Arbitrate and agree to resolve all disputes that arise between me and Brinker through formal, mandatory arbitration as outlined above.

(Jt. Ex. 4 at p. 2)

By signing the Agreement to Arbitrate in June 2012, Hickey, Gulden and Ragsdale created a voluntary and binding *contract* in which they agreed to arbitrate any employment-related disputes that might arise during their employment.[5] While it might make sense to say an employer "maintained" a policy or a rule, it does not make sense to say an employer "maintained" a *contract* between an employer and employee to arbitrate disputes. A policy or a rule may be unilaterally promulgated, but a contract requires an agreement between two or more parties, as evidenced by words or conduct. A contract either exists or not, and it is either in effect or not—as determined by the terms of the contract. To the extent there is a valid and binding contract to arbitrate disputes, the contract is "maintained" by the terms of the contract, not by the unilateral choice of either the employer or the employee. As such, the concept of "mere maintenance" of a rule that chills Section 7 rights should not apply to an arbitration contract that is binding on both an employer and an employee.

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[5] Contract formation is a matter of state law. Under Colorado law, requiring an at-will employee to sign an agreement in exchange for continued employment is permissible, and the continued employment provides consideration for the agreement. *See Lucht's Concrete Pumping, Inc. v. Horner*, 255 P.3d 1058, 1062-63 (Colo. 2011) (continued employment provided consideration for non-compete agreement employee signed during his employment); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1348-49 (Colo. 1988) (once employer provides notice of changed terms of employment, employee who continues working is deemed to have accepted them).

Because Hickey, Gulden and Ragsdale are clearly time barred from claiming their Section 7 rights were violated when they entered into the arbitration contract in June 2012, they cannot attempt to sidestep the statute of limitations by claiming Respondent violated Section 7 by "maintaining" the Agreement to Arbitrate. Support for the Respondent's position is found in the Administrative Law Judge's May 24, 2012 decision in *Albertson's, LLC and Yvonne Martinez and UFCW Local 1564,* 2012 NLRB LEXIS 301 (2012) [Order Transferring Proceeding to National Labor Relations Board dated May 24, 2012: Case Nos. 28-CA-023387 and 28-CA-023538]. While this case did not involve an arbitration agreement, it involved a situation where Counsel for the Acting General Counsel characterized certain statements made by a manager to employees during a union organizing campaign as "rules" in an apparent attempt to "make an end run around the statute of limitations with the assertion that they were rules 'maintained' during the 10(b) period." *Id.* at *25. The Administrative Law Judge concluded that the manager had not promulgated rules when she made statements to employees outside the Section 10(b) period, and dismissed the allegation of the complaint in question. *Id.* at *27.

The same result follows here because the ALJ held that Respondent "enforced" an unlawful arbitration agreement against Hickey, Gulden and Ragsdale by filing a motion in U.S. District Court seeking to compel them to arbitrate their claims against Respondent individually. "I find, as General Counsel argues, that Respondent violated Section 8(a)(1) of the Act by enforcing the Agreement to Arbitrate when it filed the Motion to Compel Arbitration of Individual Claims and to dismiss Class Action Claims in the FLSA litigation." (ALJ Dec., 7:30-32) However, for the reasons stated above, because Hickey, Gulden and Ragsdale did not file a timely charge by the end of 2012 to contest the lawfulness of the Agreement to Arbitrate, they

cannot do so over eight months later when Respondent moved to compel arbitration in their civil lawsuit. Of course, Hickey, Gulden and Ragsdale could have, and did, claim that *the District Court* should not enforce the Agreement to Arbitrate against them, but this does not mean *the National Labor Relations Board* has the "power" under Section 10(b) of the Act to invalidate an arbitration agreement entered into 14 months before Respondent filed its motion to compel.

VII. THE ALJ ERRED BY FAILING TO ISSUE A STAY IN THIS CASE PENDING FINAL OUTCOME OF THE CIVIL ACTION FILED AGAINST RESPONDENT BY HICKEY, GULDEN AND RAGSDALE IN THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLORADO

Respondent's Eighth Affirmative Defense in its Answer alleges:

> The Complaint is barred because its allegations and the remedies it seeks violate Respondent's First Amendment Rights to defend itself in a lawsuit initiated by Charging Parties by taking well-grounded and reasonably-based positions in the litigation. It is contrary to the decisions of the United States Supreme Court in *Bill Johnson's Restaurants, Inc. v. NLRB*, 103 S.Ct. 2161 (1983) and *BE&K Construction Company v. NLRB*, 122 S.Ct. 2390 (2002). The Board's Complaint should be stayed pending the final outcome of Charging Parties' civil action.

(Jt. Ex. 3, at p. 5)

Much of the stipulated record in this case consists of the pleadings, motions and other documents from the wage and hour putative class action lawsuit filed by Hickey, Gulden and Ragsdale in the U.S. District Court for the District of Colorado. (Jt. Exs. 5, 6, 7, 8, 9, 10, 11, 12, 13) The lawsuit (*Hickey, Gulden and Ragsdale, on behalf of themselves, individually, and on behalf of all others similarly situated v. Brinker International Payroll Company, L.P.,* Case No. 13-cv-00951-REB-BNB) was filed on April 12, 2013, approximately four months prior to the unfair labor practice charge being filed in this proceeding. (Jt. Exs. 1, 5)

The salient points of the civil lawsuit are easily summarized. After the suit was filed, Respondent filed a motion to compel Hickey, Gulden and Ragsdale to arbitrate their claims on an

individual basis pursuant to the Agreement to Arbitrate. (Jt. Ex. 7) All the facts concerning the arbitration agreement and the documents signed by Hickey, Gulden and Ragsdale acknowledging that that they were bound by the agreement are described in detail in Respondent's motion to compel arbitration. (Jt. Ex. 7) After the issue was fully briefed by the parties, the court issued an order on February 18, 2014, dismissing the putative class action with prejudice and compelling Hickey, Gulden and Ragsdale to arbitrate their claims individually. (Jt. Ex. 11) Hickey, Gulden and Ragsdale subsequently appealed the court's order granting the motion to compel arbitration, and the appeal is currently pending before the U.S. Court of Appeals for the Tenth Circuit. (Jt. Ex. 13)

As this procedural history demonstrates, it is clear that the validity of Respondent's Agreement to Arbitrate and its application to Hickey, Gulden and Ragsdale and the purported "class" they sought to represent in the District Court action has been, and still is, an issue that is being litigated by the parties. Respondent's motion to compel arbitration was filed because those three former employees pursued a wage and hour complaint in court instead of pursuing their claims through arbitration, which they had agreed to do when they signed the Agreement to Arbitrate. Respondent's motion was clearly well-grounded and reasonably based, as it was premised on the Supreme Court's recent decisions in *Concepcion* and *American Express,* and the motion was ultimately granted by the District Court after considerable briefing.

Under these circumstances, Respondent believes a stay of the unfair labor practice proceedings is mandated by *Bill Johnson's Restaurants, Inc. v. NLRB* and *BE&K Construction Company* and by the Board's own decision in *Bill Johnson's Restaurants, Inc. and Myrland R. Helton,* 290 NLRB 29 (1988). These decisions make clear that the NLRB may not abrogate Respondent's First Amendment right "to petition the government" by engaging in litigation that

is not "objectively baseless." Indeed, the Board stated in its *Bill Johnson's Restaurants* decision, following remand of the case from the Supreme Court: "Should the Board determine that a reasonable basis for the suit exists, however, then the Board may not enjoin the suit, *but must stay its unfair labor practice proceeding until the state court suit has been concluded.*" *Bill Johnson's Restaurants*, 290 NLRB at 30 (emphasis added).

As the analysis above demonstrates, this is a classic case for the application of the stay mandated by the Supreme Court to protect an employer's First Amendment right to "petition the government" by engaging in litigation that is not "objectively baseless." However, in this case the ALJ infringed upon Respondent's constitutional rights by refusing to follow the Supreme Court's mandate on the grounds that Respondent's claim has an "illegal objective."

The ALJ's ruling did not discuss the Supreme Court's recent decisions broadly interpreting the FAA as a favored mechanism for dispute resolution. To be more specific, the ALJ did not mention that the FAA "reflects an emphatic federal policy in favor" of arbitration. *KPMG, LLP,* 132 S.Ct. at 25. The ALJ also did not acknowledge that arbitration agreements are to be read liberally to effectuate their purpose, *Moses H. Cone Mem'l Hosp.,* 103 S.Ct. at 941, and are to be "rigorously enforced," *Perry,* 107 S.Ct. at 2526. Nor did the ALJ recognize that the FAA "requires courts to enforce agreements to arbitrate according to their terms." *CompuCredit,* 132 S.Ct. at 669; see also *Concepcion,* 131 S.Ct. 1740; *Marmet,* 132 S.Ct. 1201.

Moreover, the U.S. Supreme Court's June 2013 decision in *American Express*—issued approximately 12 months before the ALJ's decision in this matter—held that a class action waiver must be enforced according to its terms in the absence of a "contrary congressional command" in the federal statute at issue. No such command exists in the NLRA.

As the rationale analyzed above demonstrates, the ALJ clearly had no sound basis for concluding that Respondent had an "illegal objective" for filing a motion to compel arbitration, as the Supreme Court just recently held that class action waivers in arbitration agreements must be enforced.

According to the ALJ, ". . . Respondent's Motion to Compel had an illegal objective within the meaning of *Bill Johnson's Restaurants* and its progeny, in that it constituted both an attempt to enforce a policy which was in and of itself unlawful and an effort to directly proscribe employees' protected activity." (ALJ Dec., 7:32-35) This conclusion obviously cannot be squared with the U.S. Supreme Court's recent decisions in *Concepcion, CompuCredit, Marmet* and *American Express.*

In sum, the ALJ failed to articulate a sound reason for denying Respondent's First Amendment Rights under *Bill Johnson's Restaurants* and *BE&K.* The Supreme Court in those cases *mandated* a stay, a fact that clearly appears in the Board's own decision upon remand from the Supreme Court: "Should the Board determine that a reasonable basis for the suit exists, however, then the Board may not enjoin the suit, *but must stay its unfair labor practice proceeding until the state court suit has been concluded.*" *Bill Johnson's Restaurants,* 290 NLRB at 30 (emphasis added).

Respondent respectfully submits that the Board should now do what the ALJ did not do, and comply with the Supreme Court's mandate by staying this case immediately.

VIII. CONCLUSION

Respondent respectfully requests that the Complaint be dismissed in its entirety pursuant to the analysis set forth above.

Dated: July 11, 2014

Respectfully submitted,
JACKSON LEWIS P.C.

By: 

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BRINKER INTERNATIONAL PAYROLL COMPANY, LP

CERTIFICATE OF SERVICE

I hereby certify:

I am employed in the County of Douglas, State of Nebraska. I am over the age of eighteen years and not a party to the within action; my business address is Jackson Lewis P.C., 10050 Regency Circle, Suite 400, Omaha, NE 68114.

On July 11, 2014, I served the within:

BRIEF IN SUPPORT OF RESPONDENT BRINKER INTERNATIONAL PAYROLL COMPANY LP'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

on the parties and interested persons in said proceeding:

X by **first class mail** upon the following persons, addressed to them at the following addresses:

David Miller The Sawaya Law Firm 1600 Ogden Street Denver, CO 80218-1414	Attorneys for Charging Party
Renée C. Barker Board Agent National Labor Relations Board Region 27 Byron Rogers Federal Office Bldg. 1961 Stout Street, Suite 13-103 Denver, CO 80294	Counsel for the General Counsel
Wanda Pate Jones Regional Director National Labor Relations Board Region 27 Byron Rogers Federal Office Bldg. 1961 Stout Street, Suite 13-103 Denver, CO 80294	Regional Director

Additionally, on July 11, 2014, I will electronically file the above-mentioned document with the National Labor Relations Board's Office of Executive Secretary.

I declare under penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct.

Executed on this 11th day of July, 2014, at Omaha, Nebraska.

/s/ Ross M. Gardner
Ross M. Gardner

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